1934, as amended, and § 0.281 of the Commission's Rules, it is ordered, that effective November 24, 1981, the FM Table of Assignments, § 73.202(b) of the Rules, is amended with regard to the following community:

City	Channel No.
Sonora, Calif.	224A, 228A

16. It is further ordered, That this proceeding is terminated.

17. For further information concerning the above, contact Nancy V. Joyner, Broadcast Bureau, (202) 632–7792.

(Secs. 4, 303, 48 stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

Martin Blumenthal,

Acting Chief, Policy and Rules Division, Broadcast Bureau.

[FR Doc. 81-28364 Filed 9-30-81; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[BC Docket No. 81-334; RM-3750]

FM Broadcast Station in Atoka, Oklahoma; Changes Made in Table of Assignments

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: Action herein assigns FM Channel 276A to Atoka, Oklahoma, in response to a petition filed by M. J. Chase. The assignment could provide Atoka with a first local FM service.

DATE: Effective November 23, 1981.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Nancy V. Joyner, Broadcast Bureau, (202) 632–7792.

SUPPLEMENTARY INFORMATION:

In the matter of amendment of § 73.202(b), Table of Assignments, FM Broadcast Stations. (Atoka, Oklahoma); Report and order (Proceeding Terminated).

Adopted: September 17, 1981.

Released: September 23, 1981.

By the Acting Chief, Policy and Rules Division.

1. The Commission has before it for consideration a *Notice of Proposed Rule Making*, 46 FR 27728, published May 21, 1981, in response to a petition filed by M. J. Chase ("petitioner"), proposing the assignment of FM Channel 276A to Atoka, Oklahoma, as that Community's first FM assignment. Supporting comments were filed by petitioner in which she reaffirmed her intent to file for the channel, if assigned. No oppositions to the proposal were received.

2. Atoka (population 3,346),[1] in Atoka County (population 10,972), is located approximately 176 kilometers (110 miles) southeast of Oklahoma City, Oklahoma. It is currently served by daytime-only AM Station KEOR. Channel 276A could be assigned to Atoka in compliance with the minimum distance separation requirements of § 73.207 of the Commission's Rules.

3. In support of her proposal, petitioner submitted information with respect to Atoka which is persuasive as to its need for a first FM channel assignment.

4. We believe that the public interest would be served by the assignment of Channel 276A to Atoka, Oklahoma. An interest has been shown for its use, and such an assignment would provide the community with an FM station which could render a first fulltime local aural broadcast service.

5. Authority for the adoption of the amendment contained herein appears in Sections 4(i), 5(d)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and § 0.281 of the Commission's Rules.

6. Accordingly, it is ordered, That effective November 23, 1981, § 73.202(b) of the Commission's Rules, the FM Table of Assignments, is amended with regard to the following community:

City	Channel No.
Atoka, Oklahoma	276A

7. It is further ordered, That this proceeding is terminated.

8. For further information concerning the above, contact Nancy V. Joyner, Broadcast Bureau, (202) 632–7792.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

Martin Blumenthal,

Acting Chief, Policy and Rules Division, Broadcast Bureau.

[FR Doc. 81-28383 Filed 9-30-81; 8:45 am]

BILLING CODE 6712-01-M

[1] Population figures are taken from the 1980 U.S. Census.

47 CFR Part 73

[BC Docket No. 80-50; RM-3183]

FM Broadcast Station Coeur D'Alene, Idaho; Changes Made in Table of Assignments

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action assigns a second Class A FM channel to Coeur D'Alene, Idaho. In doing so, two proposed plans involving Class C channels were rejected. The proceeding was initiated by Coeur Broadcasting, Inc.

DATE: Effective November 24, 1981.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Mark N. Lipp, Broadcast Bureau, (202) 632–7792.

SUPPLEMENTARY INFORMATION:

In the matter of amendment of § 73.202(b), Table of Assignments, FM Broadcast Stations. (Coeur D'Alene, Idaho); Report and order (Proceeding Terminated).

Adopted: September 18, 1981.

Released: September 25, 1981.

By the Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 45 FR 12451, published February 26, 1980, which proposed three assignment plans to add a second FM channel to Coeur D'Alene, Idaho. One plan involved shifts in existing assignments at Libby, Montana, at Colfax, Washington, and at Orofino, Idaho.[1] Comments were received from petitioner, Coeur Broadcasting, Inc.; 4–K Radio, Inc., licensee of Station KLER–FM, Orofino, Idaho; Idaho Broadcasting Co., licensee of Station KIOB(FM), Coeur D'Alene, Idaho, Spokane Public Radio, licensee of Station KPBX(FM), Spokane, Washington; and KGVO Broadcasters, Inc., proponent for the assignment of a Class C channel for Missoula, Montana, in BC Docket No. 80–180.[2]

[1] This proposal also necessitated frequency changes for two Spokane noncommercial stations as well in order to avoid the potential for IF interference. This is discussed further below. However, because noncommercial FM assignments are not listed in the Table of Assignments, no proposed rule amendment was needed in this regard.

[2] The distance between Missoula and Coeur D'Alene is approximately 227 kilometers (142 miles) and the required distance for first adjacent channel Class C assignments, as in two of the proposed plans for Coeur D'Alene, is 240 kilometers (150 miles). However, in view of the action taken herein,

Continued

2. Coeur D'Alene with a population of 20,054,[3] is the seat of Kootenai County (population 59,770), and is located in the narrow, northern tip of Idaho, near its western border with Washington. It is 51 kilometers (32 miles) east of Spokane, Washington, and 420 kilometers (260 miles) east of Seattle, Washington. Present aural services licensed to Coeur D'Alene are fulltime AM Station KVNI and Class A FM Station KIOB.

3. The *Notice* set forth three assignment plans for Coeur D'Alene. First, we proposed to assign two Class C channels which involved upgrading Station KIOB (Channel 276A) to Class C status. Three substitutions of Class A channels, at Orofino, Idaho, at Libby, Montana, and at Colfax, Washington, were also necessary. The basis for assigning Class C channels to this community was the showing of considerable first and second FM and aural service to outlying areas which were demonstrating signficant growth. Two Class C channels were proposed to avoid intermixture, particularly since Station KIOB had just recently commenced operations: Only one Class C channel (Channel 270) however could utilize a transmitter location in or near to Coeur D'Alene. The closest site for another Class C assignment was 61 kilometers (39 miles) on Channel 291. Therefore we indicated that should the distant site restriction prove unsatisfactory or should Station KIOB not desire to avail itself of a Class C facility, one Class C channel might be assigned (Plan II). As in Plan I, three Class A channel substitutions would be necessary. Finally, we left open the option of assigning a second Class A channel to Coeur D'Alene since it seemed no unlikely that the first two plans may prove too problematic (Plan III). No other channel assignments would be affected by the second Class A channel "drop-in."

4. A number of submissions were filed in response to the three plans proposed in the *Notice*. 4–K Radio, Inc., licensee of Station KLER–FM, Channel 237A, in Orofino, Idaho, filed a pleading in which it waived its right to a hearing regarding Plan I which proposed to change its channel. It argued instead that if Channel 276A could be reassigned from Coeur D'Alene to Colfax, then the need to change Orofino's 237A assignment would be eliminated. Plan II, it argued, could also be modified to place either Channel 237A or Channel 276A in Colfax with appropriate site restrictions.[4] As to Plan III, KLER–FM notes that by placing a site restriction on Channel 272A in Colfax, Channel 272A could also be assigned to Coeur D'Alene. Alternatively it is suggested that Channel 237A or Channel 276A could be substituted, with a site restriction, for Channel 272A in Colfax.

5. Coeur Broadcasting, Inc., the petitioner, provided a list of channels available to precluded communities as requested. It also submitted that Channel 291 would be an unacceptable assignment to Coeur D'Alene, as the site restriction would place it beyond two mountain ranges thus causing severe shadowing. From such a restricted site (39 miles), petitioner insists there is no possibility of 70 dBu coverage to Coeur D'Alene. Petitioner further noted that the site for Station KIOB–FM, which is in a valley floor, would provide very poor coverage as a Class C facility thus removing the rationale for assigning a Class C channel. For the same reason, other possible Class C assignments, each needing greater site restrictions, are also unusable. Petitioner further states that it is undecided about whether it would accept a Class A assignment should the third plan be adopted, however, it does fully endorse Plan II.[5]

6. Another party filing comments is Idaho Broadcasting Co., the licensee of Station KIOB–FM (Channel 276A), in Coeur D'Alene, stating that it would accept upgrading to Channel 270, that it would share the costs of reimbursement for the related changes under Plan I, and further that Channel 276A could be reassigned to Colfax under Plan I in lieu of Channel 272A or 237A.[6]

7. We believe it has been adequately shown that Coeur D'Alene, Idaho, merits a second FM assignment. As to the first proposed plan, it appears that due to site restrictions and surrounding terrain any Class C channel other than 270 would cause severe shadowing and thus is of no interest to petitioner or any other party. Therefore we have dismissed Plan I from further consideration having been convinced that no other Class C channel is available for Coeur D'Alene. The second plan involves an intermixture of channels in Coeur D'Alene. We have consistently refused to intermix a Class C channel with an existing Class A station in this type of situtation except in two types of situations: (1) The Class A station were upgraded to the Class C channel and there was an interest in utilizing the vacated Class A frequency by some party; [7] or (2) the need for a Class C assignment based on a showing of substantial new service to unserved and underserved areas was demonstrated.[8] As to the first example, Idaho Broadcasting appears willing to switch to a Class C facility if it were reimbursed for the change in frequency, as proposed. We have no reason to believe it is otherwise willing to upgrade on its own. We also lack an expression of willingness in this regard from petitioner to the effect that it would be willing to occupy the vacated Class A frequency. In fact, petitioner stated it was undecided whether it would apply for a Class A channel under Plan III which proposed two Class A channels for Coeur D'Alene. We feel it is more unlikely that petitioner would be willing to apply for a Class A channel at Coeur D'Alene if it were to be faced with an intermixture situation. But even more important from a public interest standpoint, there is little to be gained from a Class C channel assignment. Due to the mountainous terrain, a Class C station's signal would carry a relatively short distance from Station KIOB's present site in the valley where Coeur D'Alene is located and surrounded by mountains. Thus outlying areas in need of service, could not be reached, just as none of the proposed Class C channels in Plan I or II operating from distant transmitter sites of 39 miles and beyond could reach into the Coeur D'Alene valley area. Similarly, a Class C station utilizing petitioners proposed site at Mica Peak with 75 kW at 2,200 feet approximately 10.5 miles southwest of Coeur D'Alene, according to our staff study, would not provide any first FM or aural service and would not likely provide any second FM or aural service. Rather such a location would provide an excellent signal to Spokane, only 20 miles west, and which is in line of sight from Mica Peak. This fact may have raised *Berwick* [9] concerns were we to

it was not necessary to consolidate the two proceedings.

[3] All population figures are taken from the 1980 U.S. Census.

[4] The Bureau's study indicates that a site restriction of 8.5 kilometers (5.3 miles) northwest is required for Channel 237A in Colfax, to avoid short spacing to Channel 237A in Orofino, licensed to Station KLER–FM.

[5] In addition to its comments petitioner filed a reply pleading expressing its continued support for Plan II and lack of objection to the comments of Pend Oreille and 4–K Radio.

[6] Pend Oreille Valley Broadcasting filed a petition for the assignment of Channel 285A to Newport, Washington (BC Docket No. 81–332), and, as such, in its comments submitted in the Coeur D'Alene proceeding, opposed any plan that would interfere with it. Nothing in that proposal, however, affects any of the proposals in Plans I, II or III or vice versa.

[7] See, *Rome, New York*, 42 RR 2d 618 (1978).

[8] *Fayetteville, North Carolina*, 43 FR. 36104 (1979).

[9] The *Berwick* issue involves a situation where a proposed transmitter location is so close to a larger market as to raise questions of the petitioner's true intent. See *Communications Investment Corp.* 48 RR 2d 1291 (D.C. Cir. 1981).

consider that proposal. Therefore we find that not only do we lack the willingness of Idaho Broadcasting to upgrade without reimbursement and of petitioner to be the "victim" of an intermixture result by seeking to occupy the vacated Class A channel, but, we lack the showing justifying a Class C channel for Coeur D'Alene.

8. On the other hand, pursuant to Plan III, we have no difficulty in finding a need for a second Class A channel assignment to Coeur D'Alene based on its size and lack of local service. While we do not have the unqualified expression of interest in applying for the channel that we normally require, we believe the assignment is nonetheless justified and hopefully the channel will be applied for in the near future.[10]

9. Canadian concurrence in the assignment of Channel 272A to Coeur D'Alene has been obtained.

10. Accordingly, pursuant to authority contained in Sections 4(i), 5(d)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and §0.281 of the Commission's Rules, IT IS ORDERED, That effective November 24, 1981, the FM Table of Assignments (Section 73.202(b) of the Rules) is amended with respect to the communities listed below:

City	Channel No.
Coeur D'Alene, Idaho	272A, 276A

11. It is further ordered, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Mark N. Lipp, (202) 632-7792.

(Secs. 4, 303, 48 stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

Martin Blumenthal,

Acting Chief, Policy and Rules Division, Broadcast Bureau.

[FR Doc. 81-28387 Filed 9-30-81; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[BC Docket No. 81-102; RM-3783]

FM Broadcast Station in Fort Worth and Palestine, Texas; Changes Made in Table of Assignments

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action substitutes Channel 231 for Channel 230 at Fort Worth, Texas; substitutes Channel 244A for Channel 232A at Palestine, Texas, and modifies the licenses accordingly, in response to a petition filed by Latin American Broadcasting Company.

DATE: Effective November 23, 1981.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Montrose H. Tyree, Broadcast Bureau, (202) 632-7792.

SUPPLEMENTARY INFORMATION:

In the matter of amendment of § 73.202(b), Table of Assignments, FM Broadcast Stations. (Fort Worth and Palestine, Texas); Report and Order (Proceeding Terminated).

Adopted: September 17, 1981.

Released: September 24, 1981.

By the Acting Chief, Policy and Rules Division:

1. The Commission has under consideration a *Notice of Proposed Rule Making*, 46 FR 15186, published May 4, 1981, proposing the substitution of Channel 231 for Channel 230 at Fort Worth and the substitution of Channel 244A for Channel 232A at Palestine, Texas, in response to a petition filed by Latin American Broadcasting Company ("petitioner"), licensee of Station KESS(FM), Fort Worth, Texas (Channel 230). The *Notice* also proposed modification of the licenses to specify the newly assigned channels. Comments supporting the petition were filed by the petitioner, by Vista Broadcasting Company, Inc., licensee of Station KLIS (FM), Palestine, Texas (Ch. 232A), and by Service Broadcasting Corporation, licensee of Station KKDA(FM), Dallas, Texas (Ch. 283).

2. In comments, petitioner incorporated by reference the information contained in the *Notice*, noting the benefits that could be derived from the proposed substitution of channels at Fort Worth and Palestine. To recapitulate, those benefits include moving to a site which will permit Station KESS to provide a better signal to the Spanish speaking population in the Dallas-Fort Worth area. Petitioner restated its willingness to reimburse Station KLIS (FM) for changes associated with its own channel change.

3. Vista in comments, restated its support of the proposal to modify its license from Channel 232A to Channel 244A. Service Broadcasting also filed supporting comments, asserting that the proposal, if adopted, would also permit relocation of its own transmitter site, thereby improving coverage to the black community of Dallas. Service restated its earlier commitment to share in the expenses of the KLIS(FM) channel change.

4. In the *Notice*, we stated that the substitution of Channel 231 for Channel 230 would reduce preclusion on Channels 228, 229 and 230, and would cause no new preclusion on Channels 231, 233 and 234. We also stated that new preclusion would occur, however, on Channel 232A in the Waco-Gatesville Marlin area.[1] As directed by the *Notice*, the petitioner submitted information indicating that the following channels are available for assignment to the precluded communities: Channels 221A and 289 to Marlin; Channels 221A, 269A and 289 to Waco, and Channels 269A, 289 and 290 to Gatesville.

5. We have determined that the public interest would be served by the substitution of channels, as proposed in the *Notice*, inasmuch as the substitution of Channel 231 for Channel 230 at Fort Worth would enable better broadcast service to a substantial Spanish speaking population in the area. It would also allow Station KKDA to relocate and provide better service to its listeners. The above proposal requires the substitution of Channel 244A for Channel 232A (Station KLIS (FM)), Palestine, Texas. Based on the benefits that could be derived by the proposed substitution of channels, we shall substitute Channel 230 for Channel 231 at Fort Worth, Channel 244A for Channel 232A at Palestine and modify the licenses of FM Stations KESS and KLIS to specify the newly assigned channels.

6. Accordingly, it is ordered, That effective November 23, 1981, the FM Table of Assignments, § 73.202(b) of the Commission's Rules, IS AMENDED with respect to the following communities:

City—Channel No.

Fort Worth, Texas—231, 242, 246, 258, 271, 298

Palestine, Texas—244A, 252A

7. IT IS FURTHR ORDERED, pursuant to the authority contained in section 316 of the Communications Act of 1934, as amended, the license of Station KESS (FM), Fort Worth, Texas, IS MODIFIED to specify operation on Channel 231, subject to the following provisions:

(a) At least 30 days before operating on Channel 231, the licensee shall submit to the Commission the technical information normally required of an applicant for a construction permit on Channel 231;

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[10] In assigning Channel 272A to Coeur D'Alene, we note that a site restriction of 3.6 miles south on Channel 272A at Colfax, Washington, is necessary.

[1] The *Notice* incorrectly referred to the community as "Martin."

(b) At least 10 days prior to commencing operation on Channel 231, the licensee shall submit the measurement data required of an applicant for an FM broadcast station license; and

(c) The licensee shall not commence operation on Channel 231 without prior Commission authorization.

(d) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to § 1.1301 of the Commission Rules.

8. It is further ordered, pursuant to the authority contained in section 316 of the Communications Act of 1934, as amended, the license of Station KLIS (FM), Palestine, Texas, IS MODIFIED to specify operation on Channel 244A, subject to the following provisions:

(a) At least 30 days before operating on Channel 244A, the licensee shall submit to the Commission the technical information normally required of an applicant for a construction permit on Channel 244A;

(b) At least 10 days prior to commencing operation on Channel 244A, the licensee shall submit the measurement data required of an applicant for an FM broadcast station license; and

(c) The licensee shall not commence operation on Channel 244A without prior Commission authorization.

(d) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to § 1.1301 of the Commission's Rules.

9. Authority for the actions taken herein is contained in sections 4(i), 5(d)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and § 0.281 of the Commission's Rules.

10. It is further order, That this proceeding IS TERMINATED.

11. For further information concerning the above proceeding, contact Montrose H. Tyree, Broadcast Bureau, (202) 632-7792.

(Secs. 4, 303, 48 stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

Martin Blumenthal,

Acting Chief, Policy and Rules Division, Broadcast Bureau.

[FR Doc. 81-28388 Filed 9-30-81; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[BC Docket No. 81-331; RM-3726]

FM Broadcast Station in Kailua-Kona, Hawaii; Changes Made in Table of Assignments

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action assigns Channel 228A to Kailua-Kona, Hawaii, in response to a petition filed by Norman E. and Sally A. Garrison. The proposed station would provide a first local FM broadcast service to Kailua-Kona.

DATE: Effective November 23, 1981.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTRACT: Montrose H. Tyree, Broadcast Bureau, (202) 632-7792.

SUPPLEMENTARY INFORMATION: In the matter of amendment of § 73.202(b), Table of Assignments, FM Broadcast Stations. (Kailua-Kona, Hawaii); Report and order (Proceeding Terminated).

Adopted: September 17, 1981.

Released: September 23, 1981.

By the Acting Chief, Policy and Rules Division:

1. The Commission has under consideration a *Notice of Proposed Rule Making*, 46 FR 29488, published June 2, 1981, proposing the assignment of Channel 228A to Kailua-Kona, Hawaii, as that community's first FM assignment. The *Notice* was initiated in response to a petition filed by Norman E. and Sally A. Garrison ("petitioners"). Supporting comments were filed by Shoblom Broadcasting, Inc. ("Shoblom"),[1] and by the petitioner, both stating their intent to apply for the channel, if assigned. No oppositions to the proposal were received.

2. Kailua-Kona (population 365)[2] is located in the North Kona Division (population 4,832) on the Island of Hawaii (population 63,468). Kailua-Kona is located on the west coast of the Island of Hawaii, approximately 280 kilometers (173 miles) southeast of Honolulu. It has no local aural broadcast service.

3. Petitioner incorporated by reference the information contained in the *Notice*, demonstrating the need for a first FM assignment to Kailua-Kona. They again note the lack of service at Kailua-Kona and the need for a station to meet the needs of the community.

4. We believe that the petitioner has adequately demonstrated the need for a first FM assignment to Kailua-Kona, and that the public interest would be served by assigning Channel 228A to that community. The assignment can be made in compliance with the minimum distance separation requirements.

5. Accordingly, pursuant to Sections 4(i), 5(d)(1), 303 (g) and (r) and 307(b) of the Communications Act, as amended, and § 0.281 of the Commission's, Rules, it is ordered, That effective November 23, 1981, the FM Table of Assignments, § 73.202(b) of the Rules, is amended with respect to the following community:

City—Channel No.
Kailua-Kona, Hawaii—228A

6. It is further ordered, That this proceeding is terminated.

7. For further information concerning this proceeding, contact Montrose H. Tyree, Broadcast Bureau, (202) 632-7792.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303.)

Federal Communications Commission.

Martin Blumenthal,

Acting Chief, Policy and Rules Division, Broadcast Bureau.

[FR Doc. 81-28389 Filed 9-30-81; 8:45 am]

BILLING CODE 6712-01-M

[1] Shoblom is licensee of Stations KFWJ (AM and FM), Lake Havasu City, Arizona, and Station KUUK(AM), Wickensburg, Arizona, and is the petitioner in BC Docket No. 80-744 to assign Channel 240A to Lahaina, Hawaii.

[2] Population figures are taken from the 1980 U.S. Census.

47 CFR Part 73

[BC Docket No. 81-333; RM-3758]

FM Broadcast Station in Owensville, Missouri; Changes Made in Table of Assignments

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action assigns FM Channel 237A to Owensville, Missouri, in response to a petition filed by Gerald W. Hertlein. The assignment could provide Owensville with a first local aural broadcast service.

DATE: Effective November 23, 1981.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Nancy V. Joyner, Broadcast Bureau, (202) 632-7792.

SUPPLEMENTARY INFORMATION: In the matter of amendment of § 73.202(b), Table of Assignments, FM Broadcast Stations. (Owensville, Missouri); Report and order (Proceeding Terminated).

Adopted: September 17, 1981.

Released: September 23, 1981.

By the Acting Chief, Policy and Rules Division:

1. The Commission has before it for consideration a *Notice of Proposed Rule Making*, 46 FR 27727, published May 21, 1981, in response to a petition filed by Gerald W. Hertlein ("petitioner"), proposing the assignment of FM Channel 237A to Owensville, Missouri, as that community's first FM assignment. Supporting comments were filed by petitioner in which he reaffirmed his intent to file for the channel, if assigned. No oppositions to the proposal were received.

2. Owensville (population 2,416),[1] in Gasconade County (population 11,878), is located approximately 113 kilometers (70 miles) southwest of St. Louis, Missouri. It presently has no local aural service. Channel 237A could be assigned to Owensville, provided the transmitter site is located approximately 9.2 kilometers (5.7 miles) south of that community to avoid short-spacing to Station KWWR, Mexico, Missouri, in compliance with § 73.207 of the Commission's Rules.

3. In support of his proposal, petitioner submitted information with respect to Owensville which is persuasive as to its need for a first FM channel assignment.

4. We believe that the public interest would be served by the assignment of Channel 237A to Owensville, Missouri. An interest has been shown for its use, and such an assignment would provide the community with an FM station which could render a first local aural broadcast service.

5. Authority for the adoption of the amendment herein is contained in Sections 4(i), 5(d)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and § 0.281 of the Commission's Rules.

6. Accordingly, it is ordered, That effective November 23, 1981, § 73.202(b) of the Commission's Rules, the FM Table of Assignments, is amended with regard to the following community:

City—Channel No.

Owensville, Missouri—237A

7. It is further ordered, That this proceeding is terminated.

8. For further information regarding the above, contact Nancy V. Joyner, Broadcast Bureau, (202) 632-7792.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

[1] Population figures are taken from the 1980 U.S. Census.

Federal Communications Commission.

Martin Blumenthal,

Acting Chief, Policy and Rules Division, Broadcast Bureau.

[FR Doc. 81-28391 Filed 9-30-81; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[BC Docket No. 346; RM-3766]

FM Broadcast Station in Rayville, Louisiana; Changes Made in Table of Assignments

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action assigns Channel 221A to Rayville, Louisiana, in response to a petition filed by North Louisiana Broadcast Enterprise. The proposed station would provide a first local aural broadcast service to Rayville.

DATE: Effective November 23, 1981.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Montrose H. Tyree, Broadcast Bureau, (202) 632-7792.

SUPPLEMENTARY INFORMATION:

In the matter of amendment of § 73.202(b), Table of Assignments, FM Broadcast Stations. (Rayville, Louisiana); Report and order (Proceeding Terminated).

Adopted: September 17, 1981.

Released: September 23, 1981.

By the Acting Chief, Policy and Rules Division:

1. The Commission has under consideration a *Notice of Proposed Rule Making*, 46 FR 30154, published June 5, 1981, proposing the assignment of Channel 221A to Rayville, Louisiana, as that community's first FM assignment, in response to a petition filed by North Louisiana Broadcast Enterprise ("petitioner".) Supporting comments were filed by the petitioner and by a community leader of Rayville.

2. Rayville (population 3,962),[1] seat of Richland County (population 21,774) is located approximately 320 kilometers (200 miles) northwest of New Orleans, Louisiana. It is served locally by daytime-only AM Station KRIH.

3. In comments to the proposal, petitioner restated the information contained in the *Notice* which demonstrated the need for an FM assignment to Rayville. Petitioner reiterated its intent to apply for the channel, if assigned.

4. The Commission believes that the public interest would be served by assigning Channel 221A to Rayville, Lousiana, since it would provide the community with an opportunity for its first local FM broadcast service. The transmitter site is restricted to kilometers (2.5 miles) northeast of the city to avoid short-spacing to Station KVCL-FM, Winnfield, Louisiana.

5. Accordingly, pursuant to Section 4(i), 5(d)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and § 0.281 of the Commission's Rues, IT IS ORDERED, That effective November 23, 1981, the FM Table of Assignments (Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the following community:

City	Channel No.
Rayville, Lousiana	221A

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For futher information concerning this proceeding, contact Montrose H. Tyree, Broadcast Bureau, (202) 632-7792.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Martin Blumenthal,

Acting Chief, Policy and Rules Division, Broadcast Bureau.

[FR Doc. 81-28392 Filed 9-30-81; 8:45 am]

BILLING CODE 6712-01-M

[1] Population figures are taken from the 1980 U.S. Census.

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 801

Public Availability of Information, Appendix—Fee Schedule

AGENCY: National Transportation Safety Board.

ACTION: Final rule.

SUMMARY: This revision sets forth price changes for obtaining copies of factual investigative records and other documents available from the National Transportation Safety Board (Board) under the Freedom of Information Act. Certain changes in the fee schedule are now required to reflect the price terms of the renewed contract with the commercial reproducer.

EFFECTIVE DATE: October 1, 1981.

FOR FURTHER INFORMATION CONTACT: John M. Stuhldreher, General Counsel, National Transportation Safety Board, Washington, D.C. 20594 (202-382-6540).

SUPPLEMENTARY INFORMATION: Pursuant to subsection (a)(4)(A) of the Freedom of Information Act (Pub. L. 93-502, November 21, 1974, amending 5 U.S.C. 552), fee schedules for document search and duplication must be published in the Federal Register. In 1975, after notice, the Board issued its regulations implementing this subsection. In an amended Appendix to 49 CFR Part 801, which was published at 45 FR 64193, September 29, 1980, a price list for documents published by or available from the Board was established, based on the provisions of the then current contract between the Board and the commercial reproducer. The Board has renewed that contract effective October 1, 1981, and the renewed contract necessitates certain price changes for reproduction services and photographic prints.

Pursuant to 5 U.S.C. 553, the Board believes that notice of proposed rulemaking is unnecessary and impracticable since the changes in reproduction fees were subject to and are the result of a formally advertised procurement.

PART 801—PUBLIC AVAILABILITY OF INFORMATION

Accordingly, 49 CFR Part 801 is hereby amended by revising the Appendix—Fee Schedule as set forth below.

Appendix—Fee Schedule

1. Special services fees (pursuant to 31 U.S.C. 483a). Upon request, services relating to public documents are available at the following fees:

(a) Subscriptions (Calendar year):

(1) Initial decisions of the administrative law judges—$40.00 for one subscription. $30.00 for each additional subscription.

(2) Board safety enforcement opinions and orders—$20.00 for one subscription. $15.00 for each addtional subscription.

(3) Board aircraft accident (probable cause) reports, brief format—$40.00 (U.S.) and $80.00 (foreign).

(4) Aircraft accident reports, narrative—$40.00 (U.S.) and $80.00 (foreign).

(5) Board safety recommendations—$60.00.

Note.—Send subscription orders for (a)(1), (a)(2), and (a)(5) above to: Public Inquiries Section, National Transportation Safety Board, Washington, D.C. 20594. Subscription orders for (a) (3) and (4), above, should be forwarded to the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

(b) Document certification under the Board's seal—$4.

(c) Computer tapes and services for aviation accidents. Duplication of computer tapes (or a fraction thereof)—$40.

Note.—Computer tape requests should be addressed to the Chief, Information Systems Division, Bureau of Technology, National Transportation Safety Board, Washington, D.C. 20594.

(d) The basic fees set forth provide for ordinary first-class postage prepaid. If registered, certified, air, or special delivery mail is used, postal fees therefor will be added to the basic fee. Also, if special handling or packaging is required, such costs will be added to the basic fee.

(e) Subscription fees for paragraph (a) above reproduction fees, and search fees are waived for qualifying foreign countries, international organizations, nonprofit public safety entities, State and Federal transportation agencies, and colleges and universities, after approval by the Director, Bureau of Administration. In addition, such fees may be waived or reduced for other recipients not in any of the foregoing categories, when determined by the Director, Bureau of Administration, to be appropriate in the interest of and contributing to the Board's program.

2. Reproduction fees. All documents in the Board's public files may be examined, without charge, in the Board's public reference room, located in the Public Inquiries Section, Room 808F, 800 Independence Ave., SW, Washington, D.C. A self-service duplicator in the reference room is available to the public for reproduction at a nominal cost.

All transportation mode accident files. Reproduction of accident files (statements, photographs, hearing transcripts, and other material contained in the board's accident investigation files) is accomplished by commercial contract. Reproductions of all printed matter and photographs are made from the best copy available. Requests must be forwarded to the Public Inquiries Section, National Transportation Safety Board, Washington, D.C. 20594. The contractor may bill and/or collect full payment before duplicating the requested documents. Fees are subject to change depending upon the Board's annual contract award.

Current fees are:

(a) Reproduction services:

Size (in inches)	
8½ by 11	$0.12
8½ by 14	.09
10 by 14	.01

(b) Photographic prints:

Size (in inches)	
8 by 10 black/white	$0.45
3½ by 5 color	.40
5 by 7 color	.75
8 by 10 color	3.13
2 by 2 color slide	.45

(c) Hearing transcripts $0.15 per page.

(d) Regular service—Usually, three weeks' time is required to service a request for reproduction. Filling any request for reproduction of a file that must be retrieved from the Federal Records Center will require two additonal weeks.

(e) Expedited service—A $1.00 surcharge will be made for accelerated service which will be provided within 2 working days commencing when the contractor has received advance payment or when telephone arrangements for payment have been made with the contractor. Reproduction service through the commercial contractor will be handled as follows:

Step 1. Customer places telephone or written request to the Board's Public Inquiries Section for desired accident file.

Step 2. The Board forwards order form and file to contractor.

Step 3. Contractor sends advance billing invoice, which shows total cost, to customer.

Step 4. Customer calls contractor direct and verifies that he is wiring payment to contractor, as specified by contractor, or customer returns a copy of the contractor's invoice with full payment enclosed.

Step 5. Contractor copies documents and mails them to the customer.

3. Availability of accident files. All transportation mode accident files are retained in accordance with the following schedule:

(1) Air carrier accident files and all public hearing files are retained for a period of fifteen (15) years and then destroyed.

(2) All other transportation accident files are retained for a period of seven (7) years and then destroyed.

All transportation mode accident files are retained at the Board for four (4) calendar years commencing with the anniversary date of the accident and ending on the last day of the fourth calendar year. After the retention period at the board, the files are then transferred to the Federal Records Center for retention in accordance with the schedule outlined in paragraphs (1) and (2), above, and then destroyed on the last day of the fifteenth or seventh year, as applicable.

4. Document search fee—The Board has determined that it is in the public interest to eliminate fees for the first hour of search time. For all time expended beyond the initial hour in locating documents, the fee is $5 per hour.

5. Responses to safety recommendations. Single copies of responses to safety recommendations are available without charge.

6. Documents available without commercial reproduction cost until limited supplies are exhausted.

(1) Press releases.

(2) Aircraft accident reports, narrative, and brief format probable cause reports (on request for specific accidents).

(3) Surface accident reports.

(4) Special studies.

(5) Safety Board regulations (chapter VIII of title 49, Code of Federal Regulations).

(6) Indexes to initial decisions, Board orders, opinions and orders, and staff manuals and instructions.

(7) Statistical data published by the Board.

(8) Safety recommendations.

7. Documents for sale by the Government Printing Office:

(1) Board's annual report.

(2) Volume I, National Transportation Safety Board Decisions (1967-1972).

(3) Volume II, National Transportation Safety Board Decisions (1973-1976).

(5 U.S.C. 552, 31 U.S.C. 483a, and 49 U.S.C. 1901 et seq.)

Signed at Washington, D.C., on this 28th day of September 1981.

James B. King,

Chairman.

[FR Doc. 81-28588 Filed 9-30-81; 8:45 am]

BILLING CODE 4910-58-M

49 CFR Part 826

Equal Access to Justice Act; Implementation

AGENCY: National Transportation Safety Board.

ACTION: Final rule.

SUMMARY: This amendment adds a new Part 826 to the Board's rules to provide procedural regulations to implement the Equal Access to Justice Act (the Act). That Act provides for the award of attorney fees and other expenses to certain parties who prevail against the United States in certain adversary adjudications conducted by Federal agencies. The Safety Board has concluded that it conducts one such proceeding that is encompassed by the Act. That is the review on appeal of the suspension or revocation of certain airman and other FAA certificates issued by the Federal Aviation Administration (FAA) (safety enforcement proceedings). The procedural regulations that are adopted herein provide for the hearing of fee award proceedings by Safety Board administrative law judges in FAA safety enforcement cases, with Board review, when appropriate.

EFFECTIVE DATE: October 1, 1981.

FOR FURTHER INFORMATION CONTACT: John M. Stuhldreher, General Counsel, National Transportation Safety Board, 800 Independence Avenue, S.W., Washington, D.C. 20594; telephone (202-382-6540).

SUPPLEMENTARY INFORMATION: *Public Comments:* By a notice of proposed rulemaking published September 8, 1981 (46 FR 44797), interested persons were invited by the Board to participate in the making of the proposed rules by the submission of written data, views, or arguments.

Three comments were received in response to the notice. The first comment takes issue with the Board's determination that the Act does not apply to proceedings involving the denial of airman medical certification. The Board's determination was based upon the statutory language in Section 504(b)(1)(C) of the Act (5 USC 504) which expressly excludes adversary adjudications for the purpose of granting or renewing a license. Nothing is cited in the first comment to justify reversal of that determination.

The second comment, from FAA Chief Counsel, disputes the Board's determination that FAA safety enforcement proceedings involving the suspension of revocation of certain airman or other certificates are adversary adjudications covered by the Act, claiming that the Board's position on the issue constitutes a change of its position regarding the status of dual-agency adjudications under the Act. The Board's position was set forth in the preamble to the proposed rule as follows:

> Together with other agencies of Government, including the United States Department of Justice, and the Office of the Secretary, DOT, the Board's comment on the [Administrative Conference's] Model Rules expressed some reservations regarding its role in adjudicating fee awards that may involve the ordering by the Board of the disbursement of another Government agency's funds.

We also pointed out that, in its response to our comment, to the comment of the United States Department of Justice, and to those of other agencies, the Administrative Conference cited the language of the Act and its legislative history [citations appear in 46 FR 32900], in support of its view that dual-agency situations are covered by the Act. The Administrative Conference cited statements made in floor debate in both the House and the Senate in respect to the Act in which the dual-agency situation involving the Occupational Safety and Health Review Commission's role in the adjudication of enforcement actions brought by the Department of Labor was discussed in support of the Act. (See, for example, statement of Senator De Concini, *Congressional Record*, September 26, 1980, at S. 13690).

The Board recognizes that the Act does not explicitly pertain to the dual agency situation, a factor which formed the basis of the Board's reservation previously expressed in our comments to the Administrative Conference. Nevertheless, after carefully reviewing and considering the Act in light of its legislative history, we are persuaded that it was the intent of Congress that the legislation cover proceedings where the enforcement and adjudicative functions reside in separate agencies. To conclude otherwise would be to exclude aviation enforcement proceedings from the Act altogether (since the Board is the only forum available to consider fee awards) and thereby frustrate the overall purpose of the Act of providing for the awards of fees and expenses to private parties who prevail against the United States in adversary adjudications.

A third comment was submitted by the Chief Counsel of the United States Coast Guard who recommends that appeals from fee award determinations in cases, the merits of which have been appealed to and decided by the Board, be taken directly from the decision of the Commandant to the Courts as provided by the Act. The Board has decided that there is good cause to adopt this recommendation and the final rule is modified to delete any provisions pertaining to proceedings involving the Coast Guard. Unlike the aviation enforcement proceedings discussed above, there is a forum, other than the Board, available to consider awards in marine enforcement proceedings. The administrative law judge who renders the initial decision in the fee award proceeding is a Coast Guard employee. The appeal from that decision to the Commandant provides the agency review contemplated by the Act. The fact that the appeal from the Commandant's decision on the fee award would go directly to the Courts, rather than first coming to the Board, does not, in our judgment, do any violence to the intent of the Equal Access to Justice Act.

Background

Congress enacted the Equal Access to Justice Act (Pub. L. 96-481, 94 Stat. 2325) to provide for the award of attorney fees and other expenses to certain parties who prevail against the United States in adversary adjudications conducted by Federal agencies (proceedings under section 554 of the Administrative Procedure Act, 5 U.S.C. 554, in which the position of the United States is represented by counsel or otherwise). The Safety Board has concluded that it conducts one such proceeding; which is, the review on appeal of the suspension or revocation of certain airman and other FAA certificates listed under section 609(a) of the Federal Aviation Act of 1958 (U.S.C. 1429(a) (safety enforcement proceedings). The award of fees in proceedings involving the United States Coast Guard will be conducted under rules promulgated by the Department of Transportation.

The regulations that are adopted herein establish uniform procedures for the award of fees in administrative proceedings under section 609 of the Federal Aviation Act, an action mandated by the Equal Access to Justice Act. Those procedures apply to certain persons, identified herein, when such an identified person prevails in an appeal to the Board under section 609, and

require that the Board award fees and other expenses incurred in connection with that appeal, unless the Board's administrative law judge who heard and initially decided the appeal finds that the position of the FAA was substantially justified in bringing the enforcement action that was the subject of the appeal or that special circumstances make an award unjust. Any initial decision made in response to a request for the award of fees is appealable to the full Board in order to ensure uniformity of application of the Equal Access to Justice Act to all safety enforcement proceedings in which a fee award is sought. When an award is administratively final, it will be recoverable by submission of the award to the appropriate official identified in § 826.40. The general rules applicable to all petitions for review, appeals to the Board, and initial decisions, found in Subpart B of Part 821, are applicable to the proceedings adopted herein. Moreover, appeals to the full Board from initial fee award decisions of Board administrative law judges shall be conducted in accordance with Subpart H of Part 821 of the Board's Rules of Procedure in Air Safety Proceedings (49 CFR 821.47–821.50).

Accordingly, the Board adopts a new 49 CFR part 826 to read as follows:

PART 826—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980

Subpart A—General Provisions

Sec.

Subpart B—Information Required From Applicants

Subpart C—Procedures for Considering Applications

Authority: Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 [5 U.S.C. 504 (c)(1)].

Subpart A—General Provisions

§ 826.1 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (the Act), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the National Transportation Safety Board (Board). An eligible party may receive an award when it prevails over the Federal Aviation Administration (FAA), unless the Government agency's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that this Board will use to make them. As used hereinafter, the term "agency" applies to the FAA.

§ 826.2 When the Act applies.

The Act applies to any adversary adjudication identified in § 826.3 as covered under the Act that is pending before the Board at any time between October 1, 1981, and September 30, 1984. This includes proceedings begun before October 1, 1981, if final Board action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final Board action occurs.

§ 826.3 Proceedings covered.

(a) The Act applies to certain adversary adjudications conducted by the Board. These are adjudications under 5 U.S.C. 554 in which the position of the FAA is presented by an attorney or other representative who enters an appearance and participates in the proceeding. Proceedings to grant or renew certificates or documents, hereinafter referred to as "licenses," are excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise "adversary adjudications." For the Board, the type of proceeding covered includes aviation enforcement cases appealed to the Board under section 609 of the Federal Aviation Act (49 U.S.C. 1429).

(b) The Board may also designate a proceeding not listed in paragraph (a) as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. The Board's failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the act; whether the procedure is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 826.4 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $1 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $5 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than $5 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its

affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this Part, unless the administrative law judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the administrative law judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§ 826.5 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency counsel, who may avoid an award by showing that the agency's position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

§ 826.6 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed $75 per hour. No award to compensate an expert witness may exceed the highest rate at which the agency pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the administrative law judge shall consider the following:

(1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

§ 826.7 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Board may adopt regulations providing that attorney fees may be awarded at a rate higher than $75 per hour in some or all of the types of proceedings covered by this Part. The Board will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) Any person may file with the Board a petition for rulemaking to increase the maximum rate for attorney fees. The petition should identify the rate the petitioner believes the Board should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted. The Board will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

§ 826.8 Awards against the Federal Aviation Administration.

When an applicant is entitled to an award because it prevails over an agency of the United States that participates in a proceeding before the Board and takes a position that is not substantially justified, the award shall be made against that agency.

Subpart B—Information Required From Applicants

§ 826.21 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the agency in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed $1 million (if an individual) or $5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)), or in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes this agency to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney for the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

§ 826.22 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 826.4(f) of this part) when the proceeding was initiated. The exhibit may be in any form

convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The administrative law judge may require an applicant to file additional information to determine the eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the administrative law judge in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)–(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the administrative law judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Board's established procedures under the Freedom of Information Act as implemented by Part 801 of the Board's rules.

§ 826.23 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spend in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The administrative law judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 826.24 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding, but in no case later than 30 days after the Board's final disposition of the proceeding.

(b) If review or reconsideration is sought or taken of a decision to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this rule, final disposition means the later of (1) the date on which an unappealed initial decision by an administrative law judge becomes administratively final; (2) issuance of an order disposing of any petitions for reconsideration of the Board's final order in the proceeding; (3) if no petition for reconsideration is filed, the last date on which such a petition could have been filed; or (4) issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

Subpart C—Procedures for Considering Applications

§ 826.31 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 826.22(b) for confidential financial information.

§ 826.32 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the administrative law judge upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 826.36.

§ 826.33 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 826.36.

§ 826.34 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the administrative law judge determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 826.35 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 826.36 Further proceedings.

(a) Ordinarily the determination of an award will be made on the basis of the written record; however, on request of either the applicant or agency counsel, or on his or her own initiative, the administrative law judge assigned to the matter may order further proceedings, such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application and shall be conducted as promptly as possible.

(b) A request that the administrative law judge order further proceedings

under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 826.37 Decision.

The administrative law judge shall issue an initial decision on the application within 60 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

§ 826.38 Board review.

Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the Board may decide to review the decision on its own initiative, in accordance with Subpart H of Part 821 for FAA safety enforcement matters appealed under Section 609 of the Federal Aviation Act. If neither the applicant nor agency counsel seeks review and the Board does not take review on its own initiative, the initial decision on the application shall become a final decision of the Board 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Board. If review is taken, the Board will issue a final decision on the application or remand the application to the administrative law judge who issued the initial fee award determination for further proceedings.

§ 826.39 Judicial review.

Judicial review of final Board decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 826.40 Payment of award.

An applicant seeking payment of an award shall submit to the disbursing official of the FAA a copy of the Board's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. Applications for award grants in cases involving the FAA shall be sent to: The Office of Accounting and Audit, AAA-1, Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, D.C. 20591. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

Signed at Washington, D.C., on this 28th day of September 1981.

James B. King,

Chairman.

[FR Doc. 81-28616 Filed 9-30-81; 8:45 am]

BILLING CODE 4910-58-M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1033

[Fifth Revised Service Order No. 1495]

Car Service Order; Burlington Northern Railroad Co. and Fort Worth and Denver Railway Co. Authorized To Use Tracks and/or Facilities of Chicago, Rock Island and Pacific Railroad Co.

AGENCY: Interstate Commerce Commission.

ACTION: Fifth Revised Service Order No. 1495.

SUMMARY: Pursuant to Section 122 of the Rock Island Railroad Transition and Employee Assistance Act, Public Law 96-254, this order authorizes the Burlington Northern and Fort Worth and Denver to provide interim service over the Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee), and to use such tracks and facilities as are necessary for operations. This order permits carriers to continue to provide service to shippers which would otherwise be deprived of essential rail transportation.

EFFECTIVE DATE: 12:01 a.m., October 1, 1981, and continuing in effect until 11:59 p.m., October 30, 1981, unless otherwise modified, amended or vacated by order of this Commission.

FOR FURTHER INFORMATION CONTACT: M. F. Clemens, Jr., (202) 275-7840.

SUPPLEMENTARY INFORMATION:

Decided: September 25, 1981.

Pursuant to Section 122 of the Rock Island Transition and Employee Assistance Act, Public Law 96-254, (RITEA), the Commission is authorizing Burlington Northern Railroad Company (BN) and Fort Worth and Denver Railway Company (FWD) to provide interim service over Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee), (RI) and to use such tracks and facilities as are necessary for that operation.

In view of the urgent need for continued service over RI's lines pending the implementation of long-range solutions, this order permits BN and FWD to continue to provide service to shippers which would otherwise be deprived of essential rail transportation.

Appendix A of the previous order is revised by the removal of the following:

Item 1

B. Fairfield, Iowa.
C. Henry to Peoria, Illinois, reduced to Mossville to Peoria, Illinois.
D. Phillipsburg, Kansas, to Stratton, Colorado, reduced to Phillipsburg, Kansas, to Caruso, Kansas. (C through E relettered B through D).

Item 2

C. From Groom to Adrian, Texas.

All changes effected were at the request of the involved carriers.

It is the opinion of the Commission that an emergency exists requiring that the BN and FWD, as indicated in the attached appendix, be authorized to conduct operations using RI tracks and/or facilities; that notice and public procedure are impracticable and contrary to the public interest; and good cause exists for making this order effective upon less than thirty days' notice.

It is ordered:

§ 1033.1495 Service Order 1495

(a) *Burlington Northern Inc. and Fort Worth and Denver Railway Company Authorized To Use Tracks and/or Facilities of the Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee).* Burlington Northern Inc. (BN) and Fort Worth and Denver Railway Company (FWD) are authorized to use tracks and/or facilities of the Chicago, Rock Island and Pacific Railroad Company (RI), as listed in Appendix A to this order, in order to provide interim service over the RI.

(b) The Trustee shall permit the BN and FWD to enter upon the property of the RI to conduct service as authorized in paragraph (a).

(c) The Trustee will be compensated on terms established between the Trustee and the BN and FWD; or upon failure of the parties to agree as hereafter fixed by the Commission in accordance with pertinent authority conferred upon it by Section 122(a) Public Law 96-254.

(d) Interim operators, authorized in Appendix A to this order, shall, within fifteen (15) days of its effective date, notify the Railroad Service Board of the date on which interim operations were commenced on the expected commencement date of those operations.